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No. 79-567

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, *Petitioner,*

v.

EUGENE DIFRANCESCO, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals For the Second Circuit

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE,* URGING AFFIRMANCE

MARTIN MICHAELSON
815 Connecticut Avenue
Washington, D.C. 20006
(202) 331-4538
Attorney of Record

DAVID M. GISCHE
WENDY COLLINS PERDUE
CHARLES H. DEARBORN, III
Attorneys for Amicus Curiae

Of Counsel:

HOGAN & HARTSON
815 Connecticut Avenue
Washington, D.C. 20006

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IN THE

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OCTOBER TERM, 1979

UNITED STATES OF AMERICA, Petitioner,

v.

EUGENE DiFRANCESCO, Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE, URGING AFFIRMANCE

INTEREST OF THE AMICUS */

Continuously since its founding in 1920, Amicus, American Civil Liberties Union, has sought to protect the fundamental rights guaranteed by the Constitution,

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*/ All parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk pursuant to the Court's Rule 36.2.

and to prevent violations of those rights. Amicus hopes that an argument presented by an organization experienced and concerned with protecting constitutionally guaranteed liberties may aid the Court in resolving the important constitutional question presented by this case.

SUMMARY OF ARGUMENT

From its earliest days to the present, the double jeopardy concept has protected the accused against being twice sentenced for the same crime, unless retrial is initiated by the defendant. Absent this protection, the correlative right not to be twice prosecuted would have little value. The soundness of the principle against multiple sentencing is such that until 18 U.S.C. § 3576 was enacted in 1970 no federal statute permitted government appeal of a sentence.

Section 3576 authorizes a second sentencing court to readjudicate facts, including factual review of all of the first court's proceedings. That procedure cannot be reconciled with this Court's decisions dating back more than a century, which hold that the double jeopardy clause forbids readjudication of facts unless initiated by the defendant. It is established that the double jeopardy clause bars the Government from seeking retrial after conviction. Because sentences implement and are attached to verdicts, logic compels that a sentence cannot constitutionally be appealed by a party which is barred from appealing the verdict to which it is attached.

This is not a case where, as in Swisher v. Brady, 438 U.S. 204 (1978), a

tentative, recommended punishment is increased on review by the trial court. Here, the sentence imposed by the trial court is definitive, not tentative, and two courts make separate, binding rulings.

There is no less jeopardy in being twice sentenced than in being twice tried. In each instance the power of the state is pitted against the defendant, at the defendant's peril. The Constitution does not permit the Government's interest in lengthening sentences to be balanced against the hardship to the defendant. Where the double jeopardy clause applies, "its sweep is absolute." Burks v. United States, 437 U.S. 1, 11 n.6 (1978).

Section 3576 nullifies the basic right to a single confrontation with the

state. The Court of Appeals correctly held that the statute is unconstitutional on its face. In any event, where, as here, the sentence is being served during the pendency of the appeal, double jeopardy bars the appeal.

ARGUMENT

I. THE DOUBLE JEOPARDY CLAUSE HAS ALWAYS PRECLUDED READJUDICATION OF FACTS UNLESS INITIATED BY THE DEFENDANT.

The Court has not ruled on the constitutionality of government appeal of a sentence, nor on whether an appellate court may constitutionally lengthen a sentence. No prior federal statute has authorized either practice, nor has the constitutionality of the 1970 statute at issue, 18 U.S.C. § 3576, been addressed by the Court to date.

To understand why Section 3576 violates the double jeopardy clause, review is necessary of the Court's development of the double jeopardy concept in a line of decisions extending over many years. Although these decisions have been said to be a hodge-podge from which no principle can be deduced or succinctly expressed, 1/ Amicus suggests otherwise: The Court's double jeopardy decisions stand for the principle that the Government may not overreach by repetitive use

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1/ "The riddle of double jeopardy stands out today as one of the most commonly recognized yet most commonly misunderstood maxims in the law, the passage of time having served in the main to burden it with confusion upon confusion." Note, 24 Minn. L. Rev. 522 (1940), quoted in Westen & Drubel, Toward a General Theory of Double Jeopardy, 1978 Sup. Ct. Rev. 81, 82; see also Burks v. United States, 437 U.S. 1, 9 (1978).

of the criminal justice process against the defendant. Two subordinate double jeopardy principles which these decisions establish are that (1) readjudication of facts, except when initiated by the defendant, is forbidden; and (2) the criminal justice process is not a game which the defendant automatically wins because the prosecutor or trial court has committed non-factual error.

Part I of this brief chronologically identifies leading double jeopardy decisions, which stand for the foregoing principles. Part II shows why application of these principles and decisions requires affirmance of the holding below that 18 U.S.C. § 3576 violates the double jeopardy clause. Part III demonstrates that in any event Section 3576

is unconstitutional as applied where, as here, the sentence is being served while on appeal by the Government.

Petitioner in Ex parte Lange, 85 U.S. (18 Wall.) 163 (1873), was found guilty of stealing mailbags, the statutory punishment for which was imprisonment for not more than one year or a fine. The trial judge imposed a prison sentence and a fine. Petitioner paid the fine, was imprisoned, and sought habeas corpus, claiming double jeopardy. This Court agreed, discharged petitioner, and held that his service of a valid sentence (the fine) barred the court from punishing him further. The Court said:

> If there is anything settled in the jurisprudence of England and America, it is that

no man can be twice lawfully punished for the same offense. And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offense, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense. [Id. at 168.]

For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? Why is it that, having once been tried and found guilty, he can never be tried again for that offense? Manifestly it is not the danger or jeopardy of being a second time found guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution. [Id. at 173.]

In Murphy v. Massachusetts, 177 U.S. 155 (1900), defendant was convicted of embezzlement and sentenced, but succeeded in having the sentence overturned on appeal. Although finding no constitutional infirmity in the resentencing, the Court emphasized that a different result might have followed had the defendant not caused the sentence to be vacated:

> We repeat that this is not a case in which the court undertook to impose in invitum a second or additional sentence for the same offense, or to substitute one sentence for another. On the contrary, plaintiff in error availed himself of his right to have the first sentence annulled so that another sentence might be rendered. [Id. at 160.]

One of three defendants in United States v. Ball, 163 U.S. 662 (1896), was acquitted by a jury. The

other two were convicted, and successfully appealed. The Government then reindicted all three defendants on the same charge. This Court held that even though his acquittal was based on a defective indictment, retrial of the acquitted defendant was barred by the double jeopardy clause. However, the two convicted defendants could constitutionally be retried "because upon a writ of error sued out by themselves the judgment and sentence against them were reversed." Id. at 671-72.

The principle that double jeopardy precludes government appeal following adjudication of facts was confirmed in Kepner v. United States, 195 U.S. 100 (1904). There, defendant was acquitted by the trial judge in a court

under United States jurisdiction located in the Philippines. 2/ The United States appealed to the Supreme Court of the Philippines, which reversed the trial court, found Kepner guilty and sentenced him. Kepner appealed to this Court, claiming double jeopardy. The Court reversed and discharged Kepner from prison, holding: "It is, then, the settled law of this court that former jeopardy includes one who has been acquitted by a verdict duly rendered . . . ." Id. at 130.

Stroud v. United States, 251 U.S. 15 (1919), expressed the Court's

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2/ This Court in Kepner held that the statute at issue conferred rights substantially identical to those conferred by the double jeopardy clause. The Court has always treated Kepner as expressing valid constitutional doctrine. See United States v. Wilson, 420 U.S. 332, 346 n.15 (1975).

long-held view that retrial is permissible if predicated on a defendant's successful appeal. Stroud was initially convicted of first degree murder and sentenced to death. On appeal, the United States attorney confessed error, and the Court of Appeals reversed. At retrial, Stroud was again found guilty of first degree murder, but the jury recommended life imprisonment. When Stroud then appealed to this Court, the Solicitor General confessed error. Stroud was retried, convicted, and sentenced to death. He again appealed, claiming double jeopardy by reason of the fact that while the second sentence was life imprisonment, the third sentence was death. This Court affirmed the death sentence, reasoning that:

> [T]he conviction and the sentence upon the former trials were reversed upon writs of error sued out by [Stroud] . . . . [T]hus the plaintiff in error himself invoked the action of the court which resulted in a further trial. In such cases he is not placed in second jeopardy within the meaning of the Constitution. [Id. at 18.]

In United States v. Benz, 282 U.S. 304 (1931), Benz pled guilty and was sentenced to 10 months in prison. While serving the sentence, he successfully petitioned the district court to reduce his term. The Government appealed the reduction of sentence. This Court held that a trial court may, consistently with the double jeopardy clause, shorten, but not lengthen, a sentence being served:

> The distinction that the court during the same term may amend a sentence so as to mitigate the punishment, but not so as to increase it, is not based

> upon the ground that the court has lost control of the judgment in the latter case, but upon the ground that to increase the penalty is to subject the defendant to double punishment for the same offense in violation of the Fifth Amendment . . . . [Id. at 307.]

The district court in In re Bradley, 318 U.S. 50 (1943), erroneously sentenced petitioner to a fine and imprisonment for contempt, under a statute which provided that the sanctions were alternative. Petitioner paid the fine and sought review, claiming that double jeopardy barred imprisonment. Reaffirming the rule in Ex parte Lange, 85 U.S. (18 Wall.) 163 (1873), this Court agreed with Bradley that the double jeopardy clause required release from jail: "Since one valid alternative provision of the original sentence has been satisfied, the

petitioner is entitled to be freed of further restraint." 318 U.S. at 52.

Bozza v. United States, 330 U.S. 160 (1947), presented a variation on the theme of Ex parte Lange and In re Bradley. Bozza was convicted of violating a statute which carried a mandatory sentence of a fine and imprisonment. The trial judge, in imposing sentence, inadvertently neglected to fine Bozza, but corrected the error five hours later. Bozza appealed, arguing double jeopardy, but this Court was unpersuaded. Noting that the initial sentence was invalid and unenforceable, the Court said:

> The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner. In this case the court "only set

> aside what it had no authority to do and substitute[d] directions required by the law to be done upon the conviction of the offender." [Id. at 166-67 (citations omitted).]

Petitioner in Green v. United States, 355 U.S. 184 (1957), was indicted for first degree murder. The trial judge instructed the jury that it could return a first or second degree murder verdict. The jury found Green guilty of second degree murder. On appeal, the conviction was overturned. Retrial resulted in a first degree murder conviction. Holding that the double jeopardy clause protects against the risk of conviction of the greater offense of which the defendant had been implicitly acquitted, this Court reversed. The Court stated that repetitive efforts by the Government to obtain a conviction subject the accused to

"embarrassment, expense and ordeal and compel[] him to live in a continuing state of anxiety and insecurity." Id. at 187.

> The right not to be placed in jeopardy more than once for the same offense is a vital safeguard in our society, one that was dearly won and one that should continue to be highly valued. If such great constitutional protections are given a narrow, grudging application they are deprived of much of their significance. [Id. at 198.]

Fong Foo v. United States, 369 U.S. 141 (1962), reaffirmed the principle that a judgment which encompasses the adjudication of facts is not subject to government appeal. There, the district judge, in the middle of a jury trial, directed the jury to return verdicts of acquittal. Holding that the district court lacked power to direct verdicts in the circumstances, the Court of Appeals

reversed and remanded for a new trial. This Court agreed that the directed verdicts of acquittal were "based upon an egregiously erroneous foundation." Id. at 143. Nonetheless, the Court reversed, holding that a verdict of acquittal is final and cannot be reviewed without violating the double jeopardy clause. Id.

North Carolina v. Pearce, 395 U.S. 711 (1969), presented the question, to what extent does the Constitution limit the imposition of a harsher sentence upon retrial, when the original conviction was set aside at the behest of the accused? Pearce was convicted and sentenced to prison. The conviction was reversed on his appeal, the Supreme Court of North Carolina holding his confession to have

been involuntary. Pearce was retried, convicted, and sentenced to a term in prison which, when added to the time he had already spent in prison, amounted to a longer total sentence than that originally imposed.

This Court held that, where retrial is sought by the defendant, the double jeopardy clause imposes no absolute bar to a more severe sentence upon reconviction. The Court stated that "we deal here, not with increases in existing sentences, but with the imposition of wholly new sentences after wholly new trials." Id. at 722. Emphasizing that the case arose in the context of an appeal by the defendant, the Court stated that its holding "rests ultimately upon the premise that the original conviction has, at the

defendant's behest, been wholly nullified and the slate wiped clean." Id. at 720-21. 3/

Colten v. Kentucky, 407 U.S. 104 (1972), arose under a Kentucky two-tier judicial system. Colten was convicted in

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3/ The Court further limited the holding, concluding that, because due process requires that vindictiveness be precluded from figuring in the second sentence, whenever a judge imposes a more severe sentence after a new trial, he must have specific reasons for doing so. 395 U.S. at 726. Moreover, these reasons "must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." Id. Because no such reasons were supplied in Pearce, or in its companion case, Simpson v. Rice, the Court overturned both convictions. Id. This aspect of Pearce indicates that an increased sentence by a second judge based solely on facts previously considered and adjudicated by the original trier-of-fact would be impermissible. See Whalen v. United States, 48 U.S.L.W. 4406, 4411 (April 16, 1980) (Rehnquist, J., dissenting).

an inferior court of disorderly conduct and fined $10. He then exercised his right to trial de novo in a court of general criminal jurisdiction, was tried, convicted and fined $50. A state appellate court affirmed, rejecting Colten's double jeopardy claim. This Court affirmed, reasoning that this did not present a situation where one court was "asked to find error in another court's work." Id. at 117. The Court repeatedly noted that the case arose at the request of the defendant for a new trial:

> In reality his choices are to accept the decision of the judge and the sentence imposed in the inferior court or to reject what in effect is no more than an offer in settlement . . . and seek the judgment of judge or jury in the superior court . . . . [Id. at 119 (emphasis added).]

Accord, Ludwig v. Massachusetts, 427 U.S. 618, 631 (1976) (Massachusetts' two-tier system does not offend the double jeopardy clause because "[t]he decision to secure a new trial rests with the accused alone.")

United States v. Wilson, 420 U.S. 332 (1975), held "that the Double Jeopardy Clause does not bar an appeal when errors of law may be corrected and the result of such correction will simply be a reinstatement of a jury's verdict of guilty or a judge's finding of guilt." United States v. Jenkins, 420 U.S. 358, 368 (1975) (emphasis added) (discussing Wilson). As the Wilson Court stated,

> a defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact. [420 U.S. at 345 (emphasis added) (footnote omitted).]

Thus, in Wilson, by holding that readjudication of law upon settled facts is not barred by the double jeopardy clause, the Court identified fact readjudication as a principal evil against which the double jeopardy clause protects.

Respondents in United States v. Martin Linen Supply Co., 430 U.S. 564 (1977), were tried before a jury. After the "hopelessly deadlocked" jury was discharged, the trial court entered judgments of acquittal. Id. at 565. In dismissing the Government's appeal, this Court held that double jeopardy barred retrial because the trial judge had "evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction." Id. at 572.

In United States v. Scott, 437 U.S. 82 (1978), defendant moved before and during trial for dismissal of two counts of the indictment on the ground that his defense had been prejudiced by pre-indictment delay. The trial court granted the motion. This Court concluded that the Government's appeal from the dismissal did not violate the double jeopardy rights of the defendant because

> in a case such as this the defendant, by deliberately choosing to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused, suffers no injury cognizable under the Double Jeopardy Clause . . . . [Id. at 98-99.]

Emphasizing that the question of Scott's guilt or innocence on the counts of the indictment at issue had never been adjudicated, the Court held

> that where the defendant himself seeks to have the trial terminated without any submission to either judge or jury as to his guilt or innocence, an appeal by the government from his successful effort to do so is not barred . . . . [Id. at 101.]

The Court reasoned that "the Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice." Id. at 99.

Swisher v. Brady, 438 U.S. 204 (1978), involved the Maryland juvenile court system. This Court held that the double jeopardy clause does not prohibit the Government from taking exceptions from proposed, non-binding findings of a master in that context. Two reasons central to the holding were that (1) the state was entitled to only one opportunity to

present its evidence -- to the master -- following which the record was closed, and additional evidence could be received by the judge only with the minor's consent; and (2) the judge alone was empowered by statute to be the fact-finder and adjudicator. Id. at 216. The Court distinguished the master-judge relationship presented in Swisher from the trial judge-appellate judge relationship presented in Kepner v. United States, 195 U.S. 100 (1904). The former arrangement featured a master's tentative, non-binding ruling or suggestion subject to rejection, acceptance or modification, in the trial judge's discretion; whereas the relation of trial to appellate judge, as in Kepner, "was invoked by the Government's decision to appeal an otherwise binding judgment."

438 U.S. at 217 n.15. The Court concluded that these "material" differences warranted attaching the protection of double jeopardy in the appellate context, but not in Swisher. Id.

The Court's decisions thus show that the double jeopardy clause protects the defendant's interests in connection with punishment as well as trial, and precludes a second adjudication of facts unless initiated by action of the defendant.

II. 18 U.S.C. § 3576 AUTHORIZES EVERY TYPE OF GOVERNMENT OVERREACHING AT WHICH THE DOUBLE JEOPARDY CLAUSE IS AIMED.

18 U.S.C. § 3576 offers the Government a second opportunity to obtain punishment it considers sufficiently severe. By subjecting the accused to a

second sentencing proceeding, the statute authorizes the appellate court to readjudicate facts. This arrangement is a frontal assault on the concept of double jeopardy, and constitutes manifest government overreaching. Section 3576 permits an appellate court to review -- at the Government's behest and over the defendant's objection -- the entire factual record below, including facts adduced "during the trial" and during the trial court's sentencing hearing. The statute further authorizes the second court to review "the findings and reasons" of the trial judge; and, based on these factual readjudications, to "affirm the sentence, impose or direct the imposition of any sentence which the sentencing court could originally have imposed, or remand for

further sentencing proceedings and imposition of sentence." Moreover, the appellate court is directed by the statute to hold a "hearing" -- inherently duplicative of the trial court action -- in the event the appellate court intends to make the sentence more severe.

A. The Double Jeopardy Concept From Its Earliest Days Has Prohibited Twice Sentencing The Accused For The Same Crime.

The cases cited in Part I above implement and are consistent with the common law roots of double jeopardy. At the origin of double jeopardy is the central theme that the state, with its resources and advantages, is entitled to but one opportunity to bring the accused to justice. Benton v. Maryland, 395 U.S. 784, 795-96 (1969). See generally,

J. Sigler, Double Jeopardy (1969). Trial and punishment are the two methods by which the state brings its coercive power to bear against the accused. Double jeopardy is historically associated with both trial and punishment. The ancient maxim, nemo debet bis puniri pro uno delecto -- "one punishment for one wrong" -- (said to be rooted in the Biblical injunction against raising up multiple afflictions, see M. Friedland, Double Jeopardy 5-6 (1969)), was embodied in the common law pleas in bar, autrefois convict and autrefois attaint. See Comment, Twice in Jeopardy, 75 Yale L.J. 262, 265-66 n.12 (1965). Together with the third such plea, autrefois acquit, these common law pleas prohibited the state in all circumstances from twice acting against a

defendant for committing a single crime. Id. at nn.11 & 12. 4/

The common law principle that punishment is at the heart of the double

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4/ The Government rightly notes that there is some common law basis for the view that, until the conclusion of the trial court's term, a judgment of imprisonment was deemed not final, and was, therefore, subject to revision. Government Brief at 24. As many courts have repeatedly observed, however, in this country a valid sentence is final and cannot be increased where any part of it has been served. See, e.g., Ex parte Lange, 85 U.S. (18 Wall.) 163 (1873). United States v. Sacco, 367 F.2d 368 (2d Cir. 1966) and cases cited therein. See also Commonwealth v. Weymouth, 84 Mass. (2 Allen) 144 (1861). Moreover, the common law rule in capital cases forbad changing a sentence in any respect. In Rex v. Walcot, 90 Eng. Rep. 533, the court below sentenced Walcot to be hanged, but omitted to provide that he should be disemboweled while alive. On appeal, the court rejected the government's argument that a provision for disemboweling could lawfully be added to the judgment previously announced.

jeopardy idea was expressed in the earliest American effort to articulate the double jeopardy concept, the Massachusetts Body of Liberties (1641). That document explicitly prohibited multiple sentencing, providing that:

> No man shall be twise sentenced by Civill Justice for one and the same Crime, offence or Trespasse. [§ 42, reprinted in 1 B. Schwartz, The Bill of Rights: A Documentary History 76 (1971).]

The Founding Fathers, too, were aware of the central place of punishment in the protection against double jeopardy. Madison's proposal, from which the double jeopardy clause derives, provided that:

> No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offense. [1 Annals of Cong. 434 (Gales & Seaton eds. 1789).] 5/

5/ In revising this formulation, Congress did not intend to change its coverage, but

[Footnote continued]

The Constitution's formulation, forbidding a second "jeopardy of life or limb" similarly reflects the historic coverage of punishment within the double jeopardy concept.

That sentencing is included within the coverage of double jeopardy was so plain by the 19th century that in 1873 this Court asked the rhetorical question:

> For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? [Ex parte Lange, 85 U.S. (18 Wall.) 163, 173 (1873).]

Furthermore, this and many other courts for many years have assumed that the

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5/ (Continued)

intended only to make clear that the double jeopardy clause carried forward the full protection of the common law. See J. Sigler, supra, at 32-33.

double jeopardy clause applies to a second sentencing proceeding as well as a second trial. For example, in Reid v. Covert, four justices joined in a plurality opinion addressing the applicability of the Bill of Rights to military trials, and stated:

> In Swaim v. United States, 165 U.S. 553, this Court held that the President or commanding officer had power to return a case to a court-martial for an increase in sentence. If the double jeopardy provisions of the Fifth Amendment were applicable such a practice would be unconstitutional. [354 U.S. 1, 37-38 n.68 (1957).]

The Court of Appeals below cited, in addition to Reid v. Covert, dicta to the same effect in this Court's opinions in Ex parte Lange, 85 U.S. (18 Wall.) 163, 173 (1873); Murphy v. Massachusetts, 177 U.S. 155, 160 (1900);

and United States v. Benz, 282 U.S. 304, 307 (1931), as well as dicta on point in the opinions of Courts of Appeals for five circuits. Walsh v. Picard, 446 F.2d 1209, 1211 (1st Cir. 1971), cert. denied, 407 U.S. 921 (1972); United States v. Coke, 404 F.2d 836, 845 (2d Cir. 1968)(en banc); United States v. Chiarella, 214 F.2d 838, 841 (2d Cir.), cert. denied, 348 U.S. 902 (1954); Oxman v. United States, 148 F.2d 750, 753 (8th Cir.), cert. denied, 325 U.S. 887 (1945); Frankel v. United States, 131 F.2d 756, 758 (6th Cir. 1942); Rowley v. Welch, 72 U.S. App. D.C. 351, 353 n.3, 114 F.2d 499, 501 n.3 (1940). Thus,

> [a]s is borne out by subsequent cases, the Double Jeopardy Clause as interpreted in Ex parte Lange prevents a sentencing court from increasing a defendant's sentence for any particular statutory offense

> . . . . [Whalen v. United States, 48 U.S.L.W. 4406, 4411 (April 16, 1980)(Rehnquist, J., dissenting).]

The Court of Appeals below evaluated this wealth of supportive dicta in these terms:

> Although such dicta of course are not legally binding, their number and the high authority of their sources offer impressive evidence of the strength and prevalence of the view that the double jeopardy clause bars an increase in the sentence imposed by the district court. [604 F.2d at 785.]

B. The Double Jeopardy Clause Prohibits The Government From Initiating Readjudication Of Facts.

This Court has consistently and rigorously held that facts cannot be readjudicated without violating the double jeopardy clause unless the readjudication is initiated by the defendant. 6/ See

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6/ The only arguable exception to this long-held principle involves mistrials where "manifest necessity" compels the

[Footnote continued]

cases cited in Part I, supra. This constitutional principle is historic and fundamental. Indeed, review of the cases cited in Part I of this brief shows that the prospect of fact readjudication distinguishes virtually all of the decisions where double jeopardy was found to be present from those in which it was held absent.

The rule against fact readjudication unsolicited by the defendant is not limited to action following acquittal. The Government is likewise prohibited from

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6/ (Continued)

readjudication. United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824). See also United States v. Martin Linen Supply Co., 430 U.S. 564 (1977); Illinois v. Somerville, 410 U.S. 458 (1973); United States v. Jorn, 400 U.S. 470 (1971). The mistrial cases are not germane here.

pursuing the defendant again following conviction. The common law bar of autrefois convict has been brought forward in double jeopardy law to the present day. As the Court noted in United States v. Martin Linen Supply Co.:

> The Double Jeopardy Clause also accords nonappealable finality to a verdict of guilty entered by judge or jury, disabling the Government from seeking to punish a defendant more than once for the same offense. [430 U.S. 564, 569 n.6 (1977).]

Similarly, in United States v. Wilson, the Court stated:

> When a defendant has been once convicted and punished for a particular crime, principles of fairness and finality require that he not be subjected to the possibility of further punishment by being again tried or sentenced for the same offense. [420 U.S. 332, 343 (1975).]

It is thus clear that the Government cannot constitutionally appeal

a conviction for the purpose of obtaining a more onerous sentence or for any other purpose. It follows that the Government cannot do directly, i.e., obtain a longer sentence on appeal, what it is constitutionally prohibited from doing by indirection, i.e., reconvict the accused to achieve that end.

C. Under 18 U.S.C. § 3576 Two Courts Make Binding Fact Adjudications.

It is not controverted that under Section 3576 the second court to rule on the sentence is entitled -- and, indeed, required if it intends to lengthen the sentence -- to make fact determinations. The fact determinations of the second court regarding the sentence are no more limited in scope than is the trial court's consideration of facts regarding

the sentence. Section 3576 authorizes the second court to review the whole "record, including the entire presentence report, information submitted during the trial . . . and the sentencing hearing, and the findings and reasons of the sentencing court." A "hearing" is required in the event the sentence is to be made more severe. The second court is also required to "state in writing the reasons for its disposition of the review of the sentence."

In short, Section 3576 invites the second court, once it has decided to resentence, to review the matter ab initio, and act on the merits of the sentence wholly without regard to, in exact duplication of, or with any variation upon, the trial court's action.

Contrary to the Government's contention below, see 604 F.2d at 782, the sentence imposed by the trial court under the statutory scheme at issue is not a "tentative" sentence. As the Court of Appeals noted, 18 U.S.C. § 3575(b) itself states that the trial court "shall sentence the defendant to imprisonment." 604 F.2d at 782 (emphasis added by the court).

> This command is not tentative; the sentence imposed is effective immediately. 18/ [Id.]
>
> [n. 18] DiFrancesco is presently incarcerated in federal prison at Atlanta, Georgia, serving the sentences imposed by Judge Pratt and Judge Burke. [Id. at n.18.]

Contrasting the instant procedure with other statutory arrangements, such as 28 U.S.C. § 636(b)(1) and 18 U.S.C.

§ 4205(c), the Court of Appeals below concluded:

> In contrast, the commitment ordered by the district court pursuant to § 3575 is neither tentative nor merely a predicate to a sentence "to be imposed" by the court of appeals. [604 F.2d at Id. at 782.]

Therefore, the procedure at issue here is completely different from a master's presentation to a judge of proposed, non-binding findings, as involved in Swisher v. Brady, 438 U.S. 204, 208-09 (1978).

D. Government Appeal Of The Length Of A Sentence Jeopardizes The Accused No Less Than Government Appeal Of A Verdict.

Jeopardy denotes risk. Double jeopardy denotes compounding the risk to the accused that he will be punished as the Government wills. The authorities

cited above demonstrate that the double jeopardy clause has always been applied to punishments, and not merely to the procedure by which the state's authority to punish is established. This comports with the reality of criminal justice. "Correction . . . [is] systemically the end of the official criminal justice processes . . . ." R. Goldfarb & L. Singer, After Conviction 9 (1973). The object of prosecution is to empower the state to punish.

The Government states in its Brief that sentencing does not involve "anything comparable" to the stigma, "anxiety," "embarrassment" and "ordeal" of trial. Government Brief at 35. Such statements defy common sense and universal experience. To the defendant -- unsure

whether one or 25 years of his life are to be committed to prison, whether he will be able to rejoin free society before old age, whether he will live again with his family -- the stigma, ordeal, embarrassment and anxiety of the sentence surely are all.

To be twice sentenced for the same crime is at least as oppressive as to be twice tried for it. Both situations involve confrontation between the individual and the state, with personal freedom at issue. The peril of being subjected to the more punitive sentence of a second court is plain. To suggest that a second sentencing proceeding is not jeopardous is to elevate dry theory above palpable reality.

E. Where, As Here, The Double Jeopardy Clause Applies, Its Protection Is Absolute, And Cannot Constitutionally Be Balanced Against The Government's Desire For A Longer Sentence.

The Government argues that sound social policy supports a second sentencing proceeding. Government Brief at 56-61. Amicus and other leading commentators vigorously disagree with the Government's position in that regard. See, e.g., Report on the Interdepartmental Committee on the Court of Criminal Appeal [England] (1965); Hon. L. Brewster, Appellate Review of Sentences, 40 F.R.D. 79 (1965); Report of Government Appeal of Sentences, 35 Bus. Law. 617, 634-41 (1980); Summary of Action Taken by the House of Delegates of the American Bar Association 13 (February 4-5, 1980). But the merits of that controversy are extraneous here. It is no

more germane to argue policy here than it would be to argue, in a First Amendment case, that sound policy supports integrating church with state, or to argue, in a Fourth Amendment case, that an unreasonable search is not unlawful because it may deter crime. The Court of Appeals below stated:

> We do not deny the existence of legitimate governmental interests that might be served by allowing the government to appeal a sentence, e.g., improved uniformity in sentencing. But such interests must be pursued in alternative ways that do not conflict with the fifth amendment's guarantee against double jeopardy. "[W]here [, as here,] the Double Jeopardy Clause is applicable, its sweep is absolute. There are no equities to be balanced, for the Clause has declared a constitutional policy, based on grounds which are not open to judicial examination." Burks v. United States, supra, 437 U.S. at 11 n.6, 98 S.Ct. at 2147. To

> subject Eugene DiFrancesco for a second time to the risk of the entire range of penalties that the law provides for his crimes would violate that constitutional policy. [604 F.2d at 787.] 7/

7/ The suggestion of the Court of Appeals below that government appeal of sentences "might" improve uniformity in sentencing is by no means shared by all authorities. As Judge Leo Brewster stated in an address to the Ninth Circuit Judicial Conference, "Appellate review would not in fact achieve uniformity. Even if the appellate courts should agree upon the manner of approach for sentences, we would have different results as between the circuits, and different results as between the panels on the same circuit, in the application of that approach. If the different circuits, and the panels on the same circuits, cannot agree among themselves on the law, they would have even more difficulty as triers of the facts, especially where they had had no opportunity to see the parties involved. To achieve even some resemblance of uniformity, we would have to have a nationwide sentence reviewing body, which would reconsider each sentence in every case tried. Even then, there would be disagreement among the members. If uniformity is the true goal, the only way it can be achieved is through mandatory sentences, which most of us judges, trial and appellate alike, oppose." Hon. L. Brewster, Appellate Review of Sentences, 40 F.R.D. 79, 85 (1965) (emphasis in original).

III. IN ANY EVENT, 18 U.S.C. § 3576 IS UNCONSTITUTIONAL AS APPLIED WHERE, AS HERE, THE DEFENDANT IS SERVING THE SENTENCE ON APPEAL.

Even if, contrary to the foregoing, Section 3576 could constitutionally authorize government appeal of a sentence in some circumstances, the statute must be held unconstitutional as applied where, as here, the sentence is being served while the appeal is pending. "It has long been clear that once a sentence has been imposed and the defendant has commenced service of it, the court is without power to increase the sentence." 2 C. Wright & A. Miller, Federal Practice and Procedure § 532, at 445 (1969). See also In re Bradley, 318 U.S. 50 (1943); Ex parte Lange, 85 U.S. (18 Wall.) 163 (1873); United States v. Sacco, 367 F.2d 368, 369 (2d Cir. 1966).

It would be difficult to imagine a more gross example of double jeopardy than to give the Government the power to seek, after the defendant has been sent to jail, to extend his prison term for that offense by 10, 15 or 20 years, on the ground that the trial judge was not punitive enough. To evade the coverage of the double jeopardy clause in this context would require tortuous reasoning along the lines of the Government's contention in King v. United States, 69 U.S. App. D.C. 10, 12; 98 F.2d 291, 293 (1938), that the prisoner "has served no sentence but has merely spent time in the penitentiary."

It is even possible, under the scheme of Section 3576, for the defendant to have served his entire sentence, been released, rehabilitated and reintegrated

into society while the Government's appeal is pending, and then rejailed upon imposition of the longer sentence ordered by the appellate court.

Even the Government acknowledges that "[p]erhaps there would be some ground for a double punishment finding where the defendant has completed service of a sentence prior to its increase . . . ." Government Brief at 15. However, the Government asserts that "commencement of service is a wholly fortuitous circumstance." Id. at 15-16. In support of this argument, the Government cites cases which hold that the double jeopardy clause does not prohibit revocation of probation, or bar conditional sentences. Id. at 40-41. However, in each of the contexts to which the Government refers, it is the

defendant's post-conviction conduct which is the predicate for the resulting increase in time served. Here, by contrast, the defendant has no control over the resentencing. Moreover, as the Government concedes, "These other criminal sanctions, of course, do not [unlike the instant case] involve the increase of a final sentence." Id. at 41.

This Court was right when it observed in United States v. Benz that to amend a sentence then being served for the purpose of increasing it

> is to subject the defendant to double punishment for the same offense in violation of the Fifth Amendment. [282 U.S. 304, 307 (1931).]

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

MARTIN MICHAELSON
815 Connecticut Avenue
Washington, D.C. 20006
(202) 331-4538
Attorney of Record
DAVID M. GISCHE
WENDY COLLINS PERDUE
CHARLES H. DEARBORN, III

Attorneys for Amicus Curiae

Of Counsel:

HOGAN & HARTSON
815 Connecticut Avenue
Washington, D.C. 20006

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